**IN THE HIGH COURT OF BOMBAY AT GOA**

**WRIT PETITION NO. 158 OF 2006**

M/s.Devchand Constructions. ... Petitioner

V/s.

1. The Board of Trustees of
   the Port of Mormugao. ... Respondents.

2. M/s.Hytek Coatings.

Nitin Sardesai for the petitioner.

V.B.Nadkarni, senior counsel with
Y.V.Nadkarni for respondent No.1.

M.S.Sonak with N.K.Sawaikar
for respondent No.2.

**CORAM : V.C.DAGA, J.**

**DATED : 23rd August 2006.**

**JUDGMENT :**

Rule, returnable forthwith.

Mr. Nadkarni waives service for the respondent No.1.

Mr. Sawaikar waives service for respondent No.2.

2. This petition is directed against the order dated 23rd January, 2006 passed on Exh.20 in Special Civil Suit No.22/2003/A by the civil Judge, Senior Division at Vasco-da-gama, Goa, whereby an application under order 1 rule 10 of Code of Civil Procedure, 1908 ("C.P.C." for short) was allowed and impleadment of respondent No.2/ defendant No.2 was permitted by the trial Court. The parties herein are referred to in the same capacity as they were before the trial Court for the sake of clarity.

**FACTS :**

3. The factual matrix reveals that the petitioner/ original plaintiff filed suit against

defendant No.1 for recovery of Rs.1,11,73,756/- being the amount of the final bill due and recoverable from defendant No.1 in terms of tender conditions pursuant to the agreement between the plaintiff and defendant No.1 dated 19th March, 1999. The tender and the contract terms were settled between the plaintiff and defendant No.1. The defendant No.2/ respondent No.2 herein was not a party to the said contract/ tender.

4. Somewhere in the year 2003, defendant No.1 filed written statement; wherein a statement is made that defendant No.1 is withholding the final payment of the plaintiff since the plaintiff owes certain amount to the defendant No.2. The defendant No.1 did not have any privity of contract with defendant No.2.

5. Somewhere in November, 2004, defendant No.2 filed application under order 1 rule 10 of C.P.C. For intervention in the suit claiming that the plaintiff is liable to pay defendant No.2 an amount of Rs.8,03,553/- along with interest thereon from 23rd February, 1999. The petitioner/ plaintiff has contended that from the very averments of defendant No.2 made in its application it is clear that the claim of defendant No.2 is barred by law of limitation. The plaintiff filed its reply objecting to the grant of intervention of defendant No.2. It

was contended that defendant No.2 had nothing to do with the contract between plaintiff and defendant No.1 and that the application for impleadment was made merely to delay hearing of the suit. The plaintiff has submitted that if at all there is any dispute between plaintiff and defendant No.2, a separate suit will lie. Plaintiff, thus, prayed for dismissal of the application with costs.

6. After hearing all the rival parties, the trial Court vide its order dated 23rd January, 2006 allowed application for intervention and defendant No.2 was directed to be added as party defendant to the suit. This order is a subject matter of this petition filed under Article 227 of the Constitution of India.

**SUBMISSIONS :**

7. Mr.Sardesai, learned counsel appearing counsel appearing for the petitioner/ plaintiff submits that presence of defendant No.2 in the suit for effective and complete adjudication of the question involved in the suit is not at all necessary. He submits that no relief is claimed against defendant No.2 in the suit. What is pleaded in the plaint is

circumstance leading to non-payment of the bills of the plaintiff. Apart from this, he submits that defendant No.2 has no direct interest in the litigation. The suit is a simple money claim against the original defendant/ respondent No.1 herein. He submits that the Court below did not exercise discretion in accordance with law and the impugned order suffers from the error apparent on the fact of record apart from the fact that perverse consideration being granted in the impugned order.

8. Per contra, Mr.Nadkarni, learned senior counsel appearing for the original defendant/ respondent No.1 herein tried to support the order and urged that looking to the plaint allegations the presence of defendant No.2 will facilitate disposal of the suit in most judicious manner. That is how he tried to support the impugned order.

9. Mr.Sonak, learned counsel appearing for defendant No.2 submits that the trial Court has exercised discretion in accordance with law as such writ court is not expected to interfere with the discretion exercised by the Court below. He further submits that the view taken by the court below is a reasonable and possible view. On this count also, according to him, it is not a fit case for exercise of

writ jurisdiction under Article 227 of the Constitution of India.

10. Mr.Sonak further submits that presence of defendant No.2 is necessary before the Court in view of the averments made in the plaint. In his submission, in most of the paragraphs of the plaint, the allegations are made against defendant No.2 as such his presence before the trial Court is necessary. He placed reliance on some of the judgments in support of his submission, reference of which, at this stage, is not necessary.

**CONSIDERATION :**

11. Having heard rival parties, in the backdrop of the submissions made, it is necessary to examine whether or not reliefs claimed in the suit can be granted without intervention and participation of defendant No.2. If it cannot be granted, then, the said party would be called as "necessary party". At this stage, advertence to sub-rule (2) of rule 10 of order 1 of C.P.C. would not be out of place, which reads as under:

> **"Order 1, Rule 10.**
>
> (1) ..... ..... .....
>
> (2) *Court may strike out or add parties.* - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. ..... ..... ....."

12. The reading of sub-rule (2) of rule 10 of order 1, the object behind it is to discourage contests on technical pleas, and to save honest and bona fide claimants from being non-suited. The power to strike out or add parties can be exercised by the Court at any stage of the proceedings. Under this rule, a person may be added as a party to a suit in the following two cases: (1) when he ought to have been joined as plaintiff or defendant, and is not joined so, or (2) when, without his presence, the questions in the suit cannot be completely decided.

13. Sub-rule (2) or rule 10 of order 1 of C.P.C. enables the Court to add any person as a party at any stage of the proceedings if the person whose presence before the Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of a multiplicity of proceedings is also one of the objects of the said provision in the Code.

14. In the case of ***Razia Begum v. Sahebzadi Anwar Begum***, AIR 1958 SC 886, the Apex Court has laid down the test for impleadment of the parties holding that the person concerned must have direct interest in the action. It was held thus:

> "(1) That the question of addition of parties; under R. 10 of O. 1 of the Code of Civil Procedure, is generally not one of initial jurisdiction of the court, but of a judicial consideration which has to be exercised in view of all the facts and circumstances of a particular case; but in some cases, it may raise controversies as to the power of the court, in contradistinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in S.115 of the Code;
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> (2) That in a suit relating to property, in order that a person may be added as a party, he should have direct

> interest as distinguished from a commercial interest, in the subject-matter of the litigation;
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> (3) Where the subject-matter of a litigation, is a declaration as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy;
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> (4) The cases contemplated in the last proposition, have to be determined in accordance with the statutory provisions of Ss.42 and 43 of the Specific Relief Act;
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> (5) In cases covered by those statutory provisions, the court is not bound to grant the declaration prayed for, on a mere admission of the claim by the defendant, if the court has reasons to insist upon a clear proof apart from the admission; ..... ..... .....”

15. The Apex Court, thus, in the above case of ***Razia Begum*** (supra), after considering various judgments, ruled amongst others - (i) the question of addition of parties under order 1 rule 10 of C.P.C., is generally not one of initial jurisdiction of the

Court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case and (ii) that in a suit relating to the property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest, in the subject matter of litigation.

16. The Apex Court, in the recent judgment in the case of ***Khatoon Amit Kumar v. Farida Khatoon***, 2005 (3) Mh.L.J. 330, ruled that the power of a Court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will include necessarily an enforceable legal right.

17. Considering the provision of sub-rule (2) of rule 10 of order 1 of C.P.C.; the object thereof appearing in the mind of the legislature; and the law developed and enunciated by the Apex Court, before allowing any prayer under order 1 rule 10(2), it is necessary to examine whether a person seeking impleadment has prima facie right in the subject matter of the suit and his presence before the Court may be necessary in order to enable the Court to

effectually and completely adjudicate upon and settled all the issues involved in the suit. The Apex Court in ***Udit Narain Singh Malpaharia v. Additional Member, Board Bihar of Revenue, Bihar***, AIR 1963 SC 786 observed:-

> "To answer the question raised it would be convenient at the outset to ascertain who are necessary or proper parties in a proceeding. The law on the subject is well settled; it is enough if we state the principle. A necessary party is one without whom no order can be made effectively; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding."

18. As a matter of fact, the recent judgment of the Apex Court in the case of ***Amit Kumar*** (supra) has diluted the test to be applied while adding the person as a party to the proceedings. The Court went to the extent of saying that the power of the Court to add party cannot depend solely on the question whether he has interest in the suit property what is required to be seen is whether he would suffer any prejudice, if he is not allowed to participate in the suit.

19. The nature of controversy involved would equally decide the status of the party, namely, whether it is necessary or not. Both questions have to be considered side by side. From that point of view, the controversy raised in the suit would require close scrutiny.

20. Factual matrix reveals that, originally, the plaintiff/ petitioner herein entered into a contract dated 19th March, 1999 with defendant No.1/ respondent No.1 herein; to execute the contracted work. During the course of execution of contract, defendant No.1 appears to have purchased certain goods from defendant No.2 and the said goods appear to have been used in the execution of the contracted work. According to the plaintiff, defendant No.1 did not pay its outstanding bills. With the result, the plaintiff was required to file suit for recovery of its outstanding dues.

21. It is no doubt true that in some of the paras of the plaint the plaintiff went on to allege that because of the notices served by defendant No.2 for recovery of its dues to the plaintiff with copy to the defendant No.1, amount payable to the plaintiff was withheld by defendant No.1. Thus, looking to the plaint allegations, the core question would be whether

or not the plaintiff is entitled to recover its outstanding dues from defendant No.1. The fate of the suit would not depend upon the reason as to why the payment of dues of the plaintiff was not made to which the plaintiff is legally entitled. In that event, the decree would follow. If it is held that no dues are payable to the plaintiff, then the suit will be dismissed. Therefore, the core question involved in the suit would be as to whether or not the original defendant No.1 is liable to pay outstanding dues to the plaintiff. If this be a core issue, then presence of defendant No.2 would hardly be necessary in order to effectually and completely adjudicate upon the issue as to the liability of defendant No.1 towards plaintiff. This issue, in absence of defendant No.2, can be decided, as such impleadment of defendant No.2, in my view, is not necessary. In this behalf, it would be profitable to refer to the judgment in the case of ***Banarasidass Richpal Durgaprasad v. Panna Lal Ram Richpal***, AIR 1969 Punjab & Haryana 57; wherein it has been observed:

> "I would prefer to steer a middle course and draw the golden mean. As a rule, the Court should not add a person as a defendant in a suit when the plaintiff is opposed to such addition. the reason is that the plaintiff is the dominus litis. He is the master of the suit. He cannot be compelled to fight against a person

> against whom he does not wish to fight and against whom he does not claim any relief."

It was further observed :

> "In exercising that discretion, the Courts will invariably take into account the wishes of the plaintiff before adding a third person as defendant to his suit. Only in exceptional cases where the Court finds that addition of the new defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, will it add a person as a defendant without the consent of the plaintiff."

This judgment was followed by this Court in ***Harisha v. Municipal Amravati Corporation, Amravati,*** 1987 (3) B.C.R. 19.

22. So far as exercise of the discretion and interference with the view taken by the Court below is concerned, the discretion cannot be exercised arbitrarily and/or capriciously. The Court is expected to exercise discretion in a judicious manner. Reading of the entire impugned order would show that there is absolutely no whisper with regard to ingredients of order 1 rule 10 of C.P.C. What is relied upon by the Court is para-25 of the written statement; wherein the defendant No.1 has stated that

in view of the contesting claim of plaintiff and defendant No.2/the intervenor, defendant No.1 is contemplating to deposit the said amount in the Court under section 88 of C.P.C. It is, thus, clear that the trial Court has acted upon the defence of defendant No.1. This approach is erroneous. The impleadment cannot be to facilitate one of the defendants to widen the scope of the controversy involved in the suit. The defendant No.1 is trying to take advantage of the *inter se* dispute, if any, between the plaintiff and the intervenor/ defendant No.2. The impugned order has given this scope to defendant No.1. It is, thus, clear that the trial Court has exercised discretion on erroneous consideration. In this view of the matter, this is a fit case; wherein writ jurisdiction can be exercised to set aside the impugned order. The submission made in this behalf by Mr.Sonak, learned counsel for defendant No.2 is devoid of any substance.

23. The reliance on the judgment of the Privy Council in the case of ***Monghibai v. Cooverji Umersey***, AIR 1939 PC 170 is also misplaced. As per the said judgment, presence of all parties before the Court means whose presence is necessary for effective adjudication of the issues involved. The observations cannot be read to mean the presence of stranger in a

suit against whom no relief is claimed. Hence the impugned order is liable to be quashed and set aside.

24. I must clarify that all the observations made in this order are *prima facie;* made with a view to consider whether or not impugned order should be allowed to stand. I should not be understood to have expressed any opinion on the merits of any of the issues involved. All rival contentions on merits of the issues involved in the suit are left untouched. It will be open to the court trying suit to decide all issues on its own merits. In the aforesaid view of the legal position, I am of the view that defendant No.2 is not entitled to be a party defendant to the suit.

25. In the result, petition is allowed. Impugned order dated 23rd January, 2006 is quashed and set aside. The impleadment of defendant No.2- M/s.Hitek Coatings is also set aside. Trial Court is directed to delete the name of defendant No.2 for the array of the parties of suit. Rule is made absolute in terms of this order with no order as to costs.

(V.C. DAGA, J.)